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VIA FACSIMILE & OVERNIGHT MAIL

The Hon. Blanche Lincoln
United States Senator
United States Senate
Washington, D.C. 20510-6275

Dear Senator Lincoln:

Please find enclosed my responses to the questions that your counsel, Ms. Bingel, recently conveyed to me on your behalf.

I greatly enjoyed, and remain thankful for, our recent meeting. Please do not hesitate to let me know if I can be of additional assistance.

Very truly yours,

Miguel A. Estrada

Miguel A. Estrada

MAE/vfl
Enclosure

cc: The Hon. William H. Frist
The Hon. Thomas Daschle
The Hon. Orrin G. Hatch
The Hon. Patrick J. Leahy

Follow-up Questions for Miguel Estrada
Senator Blanche Lincoln

1. Is diversity a factor that an employer or a school could take into consideration?

RESPONSE: The federal courts have a long and distinguished history of ensuring equal opportunities for all persons irrespective of race, sex or creed, and in discharging their duties in this regard they have contributed significantly to the progress our Nation has made in the last 40 years in taking full advantage of the diversity of our citizens.

Diversity is a factor that employers and schools may properly take into consideration, except when it centers on considerations of race or sex that amount to unlawful discrimination. With respect to *public* employers and universities, because of the constitutional requirement of equal protection, racial classifications are viewed with disfavor and are presumptively unlawful. Under controlling Supreme Court authority, particularly *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), a government program that creates a racial classification must be subjected to "strict scrutiny." That means that such a program may be upheld only if the classification is needed to further a compelling governmental interest and is "narrowly tailored" to achieve that end. *See also Miller v. Johnson*, 515 U.S. 900, 904 (1995) ("[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial scrutiny"); *Adarand*, 515 U.S. at 236 ("Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate").

As is apparent from the nature of the strict scrutiny test—which calls for a highly contextual and fact-specific inquiry into the nature of the justifications asserted by the government and the "fit" between those justifications and the racial classification at issue—it would be difficult to say, as a general rule, that employers or schools may or may not utilize racial classifications irrespective of the particular circumstances at issue. Although the equal protection analysis that applies to classifications based on sex (requiring that the classification serve "important," rather than "compelling," objectives and that it be "substantially related," rather than "narrowly tailored," to those objectives, *see United States v. Virginia*, 518 U.S. 515, 533 (1996)), is somewhat more lenient than the analysis applicable to racial classifications, here, too, the constitutional analysis is by necessity contextual and does not lend itself to broad generalizations.

With respect to private employers, the relevant Supreme Court precedents suggest that race and sex may be taken into account, in some circumstances, in certain employment decisions. In *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979), for example, the Supreme Court addressed the question whether an employer violated Title VII of the Civil Rights Act of 1964 by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." The Supreme Court upheld that voluntary plan, explaining that "break[ing] down old patterns

of racial segregation and hierarchy" is consistent with Title VII when the employer's voluntary plan does not "unnecessarily trammel" on the rights of white employees, does not require the discharge of any employees, does not create "an absolute bar" to anyone's advancement, and does not extend indefinitely into the future but appears designed merely to eliminate a "manifest racial imbalance." *Id.* at 208-12. The Court has applied a similar analysis to employers' voluntary affirmative action plans that take an employee's sex into account. *See Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

With respect to higher education specifically, the Supreme Court considered the extent to which schools may (consistent with equal protection principles and Title VI of the Civil Rights Act) consider race in admissions 25 years ago in *University of Calif. Regents v. Bakke*, 438 U.S. 265 (1978). In that case, a majority of the Members of the Court invalidated a program that reserved a certain number of spots in a medical school program for members of certain racial or ethnic minority groups; a different majority of the Justices also reversed an injunction that had barred the medical school from ever using race as a factor under any circumstances. Justice Powell, the only participating Justice who was a member of both majority groups, accepted the argument that "attain[ing] a . . . diverse student body" was a compelling interest that satisfied strict scrutiny in the particular context of a "properly devised" university admissions program, a context that he believed infused with First Amendment considerations that counseled some deference toward the judgment of the educators who designed the admissions program. *See* 438 U.S. at 311-12 (opinion of Powell, J.).

Because *Bakke* produced no single majority opinion for the entire Court, the lower courts have divided on the question whether the various opinions issued by the individual Justices who participated in the case set forth a rule of law that lower courts are required to follow—and in particular whether Justice Powell's opinion sets forth the controlling rule of law. Compare *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), and *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1247-50, 1261 (11th Cir. 2001), with *Smith v. University of Washington Law Sch.*, 233 F.3d 1188, 1199-1200 (9th Cir. 2000), and *Grutter v. Bollinger*, 288 F.3d 732, 738-42 (6th Cir. 2002). On December 2, 2002, the Supreme Court agreed to decide this question in the *Grutter* case. The case will be argued before the Supreme Court on April 1, 2003, and a decision should be issued before the Court's summer recess. The Court's opinion in *Grutter* will provide the framework that I will be required to follow, and would follow, in assessing any challenge to the constitutionality of a university program that considers race as a factor in admissions. Of course, as explained above, the specific application of the Court's decision in *Grutter* will necessarily depend on the particular circumstances relevant to the classification challenged.

2. Other than cases in which you were an advocate, please tell us three cases from the last 40 years of Supreme Court jurisprudence you are most critical of, and just give me a couple of sentences as to why for each one.

RESPONSE: Traditionally, it has not been considered appropriate to require judicial nominees to agree or disagree with specific Supreme Court precedents in the context of a

nominee's confirmation hearings, particularly where, as in my case, the nominee would (if confirmed) serve on an inferior court. There are several reasons for this view. As I explained when I appeared before the Committee, a nominee is not really in a position to "criticize" the work of the Supreme Court—in the sense of asserting categorically that the Court got it "right" or "wrong"—without doing the intensive work that the judicial function requires: that is, coming to the case with an open mind, listening to the parties, examining and critically testing the parties' arguments, and independently examining the record and the case law. Judges, particularly inferior court judges, have no occasion, call or need to do that with respect to questions already decided. The job of a judge is to faithfully follow and build on precedent, not to question it. As Justice Cardozo once noted, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin Cardozo, The Nature of the Judicial Process 149 (1921).

Perhaps more importantly, any statement by a nominee that a particular case is "wrong" not only is likely to be insufficiently informed, but also could easily lead to a perception that the nominee somehow has publicly committed or suggested that he will approach the relevant issues in a particular case with a jaundiced eye. I strongly believe, if I am confirmed, that I must enter judicial office (and must be believed by the public to have entered judicial office) completely unencumbered by any commitments to anyone other than compliance with the judicial oath. I can represent to you that no one at the White House or in the Executive Brach asked me to name any cases that I believe the Supreme Court got "wrong." Had I been asked, I would have declined.

For those reasons, I do not believe I can list for you cases of which I am "critical" in the sense of suggesting cases that I might decide differently if I were a judge. At the same time, I can identify cases in which I do not believe the Supreme Court has ideally discharged its role as expositor of the law for reasons wholly unrelated to whether or not the particular ruling was correct. One example is *Furman v. Georgia*, 408 U.S. 238 (1972), which narrowly invalidated existing death penalty statutes, but did so without providing any real guidance for legislatures, lower courts or members of the bar: the Court issued nine separate opinions (five in favor of overturning the sentences, and four in favor of upholding them) spanning nearly 250 pages in the United States Reports, but produced no reasoned majority opinion. The failure of the Court to provide a unifying rationale was especially unfortunate because the Court was breaking new ground, and apparently departing from a very recent decision of the Court. *See McGautha v. California*, 402 U.S. 183, 207-08 (1971).

A similar example is *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), a case involving the constitutionality of certain restrictions on advertising by liquor retailers. Although all nine Justices believed that the restrictions were not consistent with the First Amendment, the Justices issued a total of four opinions that variously disavowed the test for commercial speech restrictions previously set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), applied that test "narrowly," and suggested a "less than strict" review was appropriate under *Central*

Hudson. Seven justices, in two different plurality opinions, also "disavowed" or "distinguished" *Posadas de Puerto Rico v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), another precedent that was barely a decade old. Again, while I hold no particular brief for any of the views advanced by the competing, overlapping opinions in *44 Liquormart*, and certainly do not pretend to have the answer to the difficult questions confronted by the several opinions, I am critical of opinions like this one because they make it difficult for litigants and courts to derive needed guidance from Supreme Court pronouncements.

A final example of the type of case in which I believe the Supreme Court has served its role in our legal system less than well—wholly apart from the merits of the issue or the correctness of any particular ruling—is a line of cases dealing with the extent to which it may be appropriate to permit courts, rather than juries, to find facts that increase a criminal defendant's sentence. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 526 U.S. 227 (1999), the Court in succeeding years narrowly divided (5 to 4) to permit and then apparently forbid such fact-finding by the court. A year later the Court, after a review of its precedents, again divided 5-4 in announcing that the Constitution requires the government to prove to a jury, beyond a reasonable doubt, any fact (other than a prior conviction) that increases the penalty for the crime beyond the statutory maximum. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). In so doing, the *Apprendi* Court strongly suggested that its ruling was fully consistent with *Walton v. Arizona*, 497 U.S. 639 (1990), for it noted that it had previously "rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges . . . to find aggravating factors before imposing a sentence of death." *Apprendi*, 530 U.S. at 496-97 (citing *Walton*).

Barely two years later, however, the Court concluded that "*Apprendi*'s reasoning is irreconcilable with *Walton*'s holding" and accordingly "overrule[d] *Walton* in relevant part." *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002). On the same day it decided *Ring*, the Court issued another fractured ruling applying (but this time distinguishing) *Apprendi*, with at least one Justice in the five-member majority apparently concurring in the result primarily on the basis of his disagreement with *Apprendi*. *See Harris v. United States*, 122 S. Ct. 2406 (2002); *see id.* at 2420-22 (Breyer, J., concurring in part and concurring in the judgment); *see also id.* at 2420 (O'Connor, J., concurring) ("As I dissented in *Jones* and *Apprendi* and still believe both were wrongly decided, I find it easy to reject petitioner's arguments"). Again, without expressing any view on the merits of these difficult issues, it seems to me fairly plain that the Supreme Court's opinions in these cases make it extremely difficult for legislatures, lower courts and litigants to obtain reliable guidance in this important area of the law, particularly in light of the Court's decision to overrule a case that was barely a decade old and which seemingly was reaffirmed in *Apprendi* itself and in light of the fact that one half of the Court's latest word on the subject (the *Harris* case) appears to turn on the votes of Justices who reject the governing precedent (*Apprendi*). In cases like these, I believe the Court serves its institutional role as expositor of the law less than well.

To sum up, my criticism of these cases reflects my strong belief than an appellate court is a *court*, not a collection of individual judges. The judges on an appellate court have a

solemn responsibility to act collegially to produce rulings that are as reasoned and clear as possible. If confirmed, I would always strive to keep this in mind and remember that I am just one member of a multi-judge court. I would work very hard and collaboratively with other judges on the court not only to reach the right answers in every case, but to do so in a manner that provides the most reasoned and clearest possible guidance for the people affected by the court's decisions.

3. Which judge has served as a model for the way you would conduct yourself as a judge and why?

RESPONSE: As I previously stated, I have a great deal of admiration for Justices Anthony Kennedy and Lewis Powell and for Judge Amalya Kearse—the judges for whom I worked as law clerk. Judge Kearse, who gave me my first job out of law school, was the first African American lawyer to become a partner in a major Wall Street law firm; she has one of the finest analytical minds of any lawyer with whom I ever have been privileged to work. Justices Kennedy and Powell, after distinguished careers at the bar, excelled as Justices in our highest Court; I deeply admire their life accomplishments, fair-mindedness, and collegiality.

There is, however, no judge who would serve as a model for my conduct as a judge with respect to the adoption of a particular methodology, philosophy, or approach to constitutional or statutory issues. There are several reasons for that. First, precedent often dictates or requires a particular methodological approach to a given part of the Constitution. The required methodological approach for the particular question at hand may be result of doctrinal developments in which the views of a particular Justice whom I may personally admire—say, for example, the second Justice Harlan—did not prevail or prevailed only in modified form. Whatever admiration I might have for a particular judge or Justice, my duty as a judge would be to follow the approach to the question that was adopted by the Supreme Court.

Second, I cannot honestly say that I am familiar enough with the entire body of work of any one particular judge to say without hesitation that I would "model" my work as judge on his or her approach. Many of our most renowned judges have lived prolific legal lives; Justices Holmes, Byron White, John Marshall and Thurgood Marshall, for example, served our country with distinction for several decades. I am fairly certain that most practicing lawyers (even those who, like me, are fortunate to practice regularly before the Supreme Court)—or, indeed, most court of appeals judges—generally would be able to offer only what might be loosely described as impressionistic judgments of the entire work-life of even our most renowned judges. To be sure, such judgments may be adequate to identify particular *aspects* of a judge's work that one admires. For example, I have often been struck by the rhetorical power of Justice Jackson's and Justice Scalia's opinions; by the judicial restraint of Justice Frankfurter and the second Justice Harlan; by Justice Brennan's thoroughness; by Chief Justice Rehnquist's ability to forge consensus in difficult questions; and by the vision displayed by the first Justice Harlan in *Plessy*.

Last, but not least, I am very much my own man. If I am confirmed, I will view my job as getting the right answer to the cases that come before me—in light of the relevant text,

history, precedent and any other interpretative aid that seems in my judgment appropriate in the circumstances—without any preconception as to how some other judge might approach the same or similar questions. As I stated when I appeared before the Committee, I believe one of the most important attributes of a judge is to have an appropriate process for decision-making. That entails coming to cases with an open mind, listening to the parties, reading their briefs, going back behind those briefs and doing all of the legwork needed to ascertain who is right in his or her claims as to what the law says and what the facts are. In an appellate court, where judges sit in panels of three, it also entails engaging in deliberations and giving ear to the views of colleagues who may have come to different conclusions. In sum, I am committed to judging as a process that is intended to give us the right answer, not simply a result.